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UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, and STATE OF CALIFORNIA, et al.

Plaintiffs,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, et al.,

Defendants,

AND RELATED COUNTER-CLAIMS, CROSS-CLAIMS AND THIRD-PARTY ACTIONS.

Case No. CV 90-3122 R

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' CONTINGENT VALUATION REPORT AND TESTIMONY BASED THEREON

Date: April 10, 2000
Time: 10:00 A.M.
Place: Courtroom 8
312 N. Spring Street

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INTRODUCTION

A. Plaintiffs' Contingent Valuation Surveys Are Inadmissible.

The government has conducted two surveys of the public as support for a so-called contingent valuation study. The study attempted to quantify the alleged monetary damage, called "lost use" damages, resulting from purportedly diminished populations of certain fish and birds in the vicinity of the Palos Verdes Shelf. Based on these surveys, the government contends that the "lost use" damages in this litigation are approximately $305 million, constituting the bulk of the government's proposed damages.

However, the government surveys presented information to the public that is flatly contrary to the uncontroverted record in this case. The surveys informed the public that two local fish species, white croaker and kelp bass, are "having problems producing young" at the Palos Verdes Shelf and that these fish "produce fewer young" there than elsewhere. The government's own fish experts testified, however, that there is no evidence that white croaker and kelp bass at the Palos Verdes Shelf are having problems producing young or produce fewer young than elsewhere. Thus, there is no evidence that these fish experience the reproduction problems attributed to them in the government surveys. Likewise, the surveys also fundamentally misrepresented the facts about the two bird species they addressed, peregrine falcons and bald eagles.

Because the surveys directly contradict the uncontroverted record, they – and therefore the contingent valuation study based on them – are fatally flawed and must be excluded under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny.

B. A Prompt Ruling Will Save All Parties Time And Expense.

Defendants do not now present all the arguments against the use of contingent valuation ("CV") as a general matter. The literature on this subject is voluminous and includes a number of refereed journal articles authored by eminent economists identifying the shortcom-

ings and imprecision of methodology.[1]

Nor does this motion present all of Defendants' arguments demonstrating why the particular CV surveys in this case are fatally flawed. Creating the complete record to expose and document these defects could require deposing all thirteen of the individuals designated by Plaintiffs as experts about the surveys and conducting additional related discovery.[2]

By granting this motion, the Court can eliminate the need for the parties to incur the extreme time and expense of all this additional discovery and investigation. See Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1089 (10th Cir. 1994) ("under Rule 702, we suggest that as 'gatekeeper' the district court carefully and meticulously make an early pretrial evaluation of issues of admissibility") (emphasis added). Furthermore, a ruling excluding the CV survey will facilitate meaningful settlement discussions about the lesser amounts realistically at stake in this case.

STATEMENT OF FACTS

A. The Palos Verdes Shelf Ecosystem Is Sound.

Plaintiffs continue to tout their flawed CV surveys even though they are contrary to the record. Plaintiffs commenced this case in 1990 with much hue and cry about the alleged "legacy" of Montrose. They have since learned, however, after spending more than $30 million on investigations over the course of ten years, that their initial claims of widespread injury to birds, fish and mammals were unsupportable. The truth of the matter is that the local ecosystem is healthy and robust.

The government's investigators have shown that species such as brown pelicans

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[1] E.g., Peter A. Diamond and Jerry A. Hausman, Contingent Valuation: Is Some Number Better Than No Number?, 8 Journal of Econ. Perspectives No. 4, at 45, 46 (Fall 1994) ("In short, we think that the evidence supports the conclusion that to date, contingent valuation surveys do not measure the preferences they attempt to measure.") (attached to Appendix of Other Authorities filed under separate cover herewith).

[2] The thirteen experts were identified by Plaintiffs in October 1994.. They are: (1) Richard Carson, (2) W. Michael Hanemann, (3) Ray Kopp, (4) Jon Krosnick, (5) Robert Mitchell, (6) Stanley Presser, (7) Paul Ruud, (8) Kerry Smith, (9) Martha Berlin, (10) Ralph DiGaetano, (11) Susan Rieger, (12) Renee Slobasky, and (13) Joseph Waksberg.

and California sea lions, which breed almost exclusively in the local area and formerly were thought (but never proven) to be impacted by DDT and PCBs, today are healthy, abundant and experiencing their all-time record populations. As we describe in detail below, the peregrine falcon, which was once a centerpiece of the trustees' damage claims, has been restored to the Channel Islands. Likewise, there is no demonstrable reproductive injury to kelp bass and white croaker, two species of fish that the government alleged were injured. Also, even as to the sediments at the Palos Verdes Shelf, government consultants concluded in 1996 that "[t]here have been remarkable improvements in marine ecological conditions."[3]

B. Plaintiffs' Public Opinion Surveys Of Damages.

Because the Palos Verdes Shelf ecosystem is sound, Plaintiffs were forced to resort to the methodology known as contingent valuation to generate their exaggerated damages claim. In 1991, Plaintiffs hired Natural Resource Damage Assessment, Inc. ("NRDA"), a consulting group composed of economists and survey specialists, to conduct CV surveys. See Ex. 2:11 (Plaintiffs' CV Report, Vol. 1 (Sept. 30, 1994)).[4] "Lost use value," which supposedly is measured by the surveys, purports to describe the hypothetical monetary damages caused by injury to a natural resource, and allegedly represents the dollar amount necessary to compensate the public for such injury. Ex. 2:38.

NRDA conducted two surveys in 1994, a "base" survey and a "scope" survey. As described below, the former purported to address injuries to more species over a longer time than did the latter. Each respondent participated in only one of the two surveys. NRDA made a presentation to each respondent that described: (i) certain supposed reproductive impairment injuries to birds and/or fish in the Southern California Bight; (ii) the time purportedly required for the injuries to disappear naturally; and (iii) the time for the injuries to disappear if a man-made remedy were used. Ex. 2:35.

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[3] Janet K. Stull, Ocean Monitoring Off Palos Verdes, Southern California, 1970-1995, Oceans '96 MTS/IEEE Conference Proceedings (1996) at 299, 304 (Simshauser Decl., Ex. 1).

[4] Citations herein to "Ex. x:y" refer to the exhibits attached to the Declaration of Peter Simshauser filed herewith. "X" designates the exhibit number. "Y" designates the page number that has been placed on each page of the exhibits in accordance with the Local Rules.

For the base survey, the respondents were told that two bird and two fish species (peregrine falcons, bald eagles, white croaker, and kelp bass) were not reproducing successfully in the Southern California Bight, that natural recovery would take fifty years, and that a man-made remedy would accelerate recovery by forty-five years. Exs. 2:35, 3:285-302. For the scope survey, the respondents were told only that the two fish species were not reproducing successfully, that natural recovery would take fifteen years, and that the man-made remedy would accelerate recovery by ten years. Ex. 4:356-70.

In each survey, the respondents were asked how much they would pay in a one-time tax to fund the man-made remedy. Exs. 2:152 , 3:309, 4:390. For the base survey, NRDA calculated that the average the respondents said they would be willing to pay was $55.58; for the scope survey this amount was $29.52. Ex. 2:257. NRDA arbitrarily multiplied these results by the number of households in California in 1994 (10.3 million) to calculate a lost use value of $575 million for the base survey. Ex. 2:266. In 1994, Plaintiffs claimed they were entitled to recover this amount as lost use damages.

Although a dollar total for the scope survey was not reported, $29.52 multiplied by 10.3 million is approximately $305 million. In mid-June 1997, Plaintiffs began to rely on this amount as their alleged lost use damages. Specifically, in responses to Defendants' damages interrogatories that Plaintiffs prepared in June 1997, they alleged natural resource damages of $357 million, $305 million of which consisted of interim lost use damages based on the scope survey. Ex. 5:437-39, 441. Plaintiffs relied on the $305 million value in arguing to Judge Hauk that their $46 million settlement with Los Angeles County Sanitation District was fair. (Now that Judge Hauk has approved the settlement, however, Plaintiffs have said they intend to submit the $575 million survey result at trial. Simshauser Decl. ¶ 16.)

C. Plaintiffs' Biological Experts Have Acknowledged That The Surveys Were Based On False And Unsupported Information.

At no time before conducting the CV surveys in March-August 1994 did NRDA consult with Plaintiffs' biological experts to confirm whether the injury descriptions in the surveys were accurate. Discovery has demonstrated that many of the claimed injuries did not

exist at the time of the surveys (and do not exist today), and that there is no evidence in the record to support the assumption that others existed.

1. The Base Survey's False And Misleading Information About Alleged Reproductive Injury To Peregrine Falcons.

NRDA told the survey respondents in the base survey that peregrine falcons in the Southern California Bight were experiencing reproduction problems in several respects. The respondents were told that peregrines "have usually not been able to hatch any of their eggs;" that the birds "are not increasing" in the Southern California Bight; and that peregrines were having "reproduction problems along the South Coast[5] but not elsewhere along the California coast." Ex. 3:291, 293-94 (emphasis in original). As Brian Walton and Grainger Hunt, Plaintiffs' own experts on alleged injuries to peregrine falcons, testified at their depositions, however, these representations were not true.

Mr. Walton has conducted extensive population and reproduction surveys of peregrine falcons in the Southern California Bight over the past decade. When he was presented at his deposition with a copy of the base survey, he testified that each of the above-quoted statements was false. Instead, Mr. Walton testified that peregrine falcons are flourishing on the Channel Islands, and particularly on the northern islands, where historically there were approximately ten recorded pairs and today there are at least twelve.

The following portion of Mr. Walton's deposition illustrates how he specifically found the base survey's injury description to be false and inaccurate:

> Q [D]o you see the statement at the bottom of page 6 that says, quote, "The scientists hoped these birds," referring to peregrine falcons and bald eagles, "would be able to reproduce naturally and reestablish themselves in the area," "the area" being the south coast and Channel Islands area? . . . And the next statement is, quote, "Thus far, however, these birds have usually not been able to hatch any of their eggs"?
>
> A Okay.
>
> Q Do you see that, sir?
>
> A Yes.

---

[5] The "South Coast" area defined by NRDA encompasses the Southern California Bight. See Ex. 3:290, 334.

Q It would not have been true in '93 and '94 to say that peregrine falcons on the Channel Islands usually were not able to hatch any of their eggs; correct, Mr. Walton?

A If you say "any of their eggs," that would not be true.

* * *

Q On page 8, at the bottom of the page, there is a statement that says, quote, "Along the South Coast, however, the eagles and falcons are not increasing. This is because no eagles have hatched young on their own and only rarely have some Peregrine Falcons been able to do so."

A I see it. Yes.

Q Now, it was not accurate in 1993 and 1994 to say that along the south coast, falcons were not increasing; correct, sir?

A That wasn't correct. . . . They were increasing.

* * *

Q And finally, let me direct your attention to page 9 of Exhibit 32.

A Okay.

Q In particular, you see the first statement on that page, "Many scientists have studied why these four species of fish and birds," referring again to peregrine falcons being among the birds –

A Okay.

Q – "are having reproduction problems along the South Coast but not elsewhere along the California coast."

Do you see that statement, sir?

A Yes.

Q It was not accurate in 1993 or 1994 to say that peregrine falcons in the Channel Islands or south coast were having reproduction problems but that peregrine falcons elsewhere along the California coast were not; correct, sir?

A That is correct.

Ex. 7:484-87 (Walton tr. 445:13-446:9, 446:17-447:8, 447:16-448:9).

Dr. Hunt similarly testified that the survey's descriptions of injury to peregrine falcons were false. Dr. Hunt testified that it was false to say in 1993 and 1994 that peregrine falcons "usually failed to hatch their eggs" and that peregrine falcons had "been able to hatch

young on their own rarely." Ex. 8:492-95 (Hunt tr. at 601:10-604:15).[6] Dr. Hunt did not know of any impaired reproduction in peregrine falcons. Ex. 8:491 (Id. at 265:8-18). He testified that the population of peregrine falcons in the Southern California Bight and the Channel Islands has been increasing throughout the 1990s, and will continue to increase. Ex. 8:496-97, 489-90 (Id. at 605:8–606:11, 263:14-264:7).

Thus, both Mr. Walton and Dr. Hunt demonstrated that NRDA's base survey was false and misleading, because peregrine falcons were not and are not suffering the injuries it described.

2. The Base Survey's False And Unsupported Information On Alleged Injury To Bald Eagles.

NRDA told the survey respondents in the base survey that in the 1940s there had been "about 24 pairs of Bald Eagles . . . in the South Coast." Ex. 3:291. NRDA also represented that bald eagles were having reproduction problems in the Southern California Bight, but "are increasing in number" in "the rest of the United States." Ex. 3:293 (emphasis in original).

Plaintiffs' expert on the local bald eagle population, Mr. David Garcelon, testified that this supposedly factual information was inaccurate and/or unsupported. After reviewing a copy of the base survey Mr. Garcelon testified that he did not know of "any factual basis to support the statement [in the survey] that there were about 24 pairs of bald eagles successfully hatching eggs in the south coast in the 1940s." Ex. 9:501 (Garcelon tr. at 215:6-21). Furthermore, Mr. Garcelon testified that bald eagles are "suffering reproductive impairment and not increasing" in parts of the United States besides Southern California, such as the Great Lakes area and the Columbia River Basin. Ex. 9:499-500 (Id. at 54:16-55:17). Accordingly, the survey's statement that bald eagles "are increasing in number" in "the rest of the

---

[6] When Dr. Hunt was asked whether it was true to say that "peregrine falcons on the Channel Islands usually were not able to hatch any of their eggs" (the same language as used in the CV survey), counsel for the State of California objected that the question was vague and ambiguous in using the terms "usually" and "any of." Ex. 8:492-93 (Hunt tr. at 601:10-602:3). It is curious that Plaintiffs approved of a survey instrument that included questions they considered to be vague and ambiguous.

United States" was a false and misleading effort to depict the local environment as uniquely affected by DDT and PCBs.

3. The Base and Scope Surveys' False And Unsupported Information About Reproductive Injury To White Croaker.

The government's misstatements about birds concerned only the base survey, which supported the former $575 million estimate of damages. Today, the Plaintiffs seek to rely on the scope survey, which addressed only alleged injuries to fish and concluded that the total lost use damages are $305 million.

The NRDA surveyors told the survey respondents in the scope survey that white croaker were experiencing reproductive problems in that they were "having problems producing young in one place off the South Coast," and that they "produce fewer young [there] than elsewhere." Exs. 3:290, 4:361 (emphasis in original).

Plaintiffs' experts on white croaker on the Palos Verdes Shelf are Jo Ellen Hose and Jeffrey Cross. Contrary to the statements in the survey, neither expert found that white croaker on the South Coast were having problems producing young, or that white croaker on the South Coast were producing fewer young than elsewhere.

Dr. Hose testified that she did not know that white croaker at the Palos Verdes Shelf, or anywhere in the Southern California Bight, are having trouble producing young, and that she did not know of any population effects on white croaker in the Southern California Bight. Thus, Dr. Hose testified:

Q You're not saying that white croaker are producing fewer young on the Palos Verdes Shelf or the San Pedro Bay than elsewhere?

A No, we're not making any specific statement that fish from the Palos Verdes Shelf or the San Pedro Bay are producing fewer young.

Q You don't know whether that's true or not true or has ever been true or not true; isn't that right?

A No, we don't know for sure whether that has ever been true or is currently true now.

Q And you don't know whether white croaker have ever had problems producing young off of the – or on the Palos Verdes Shelf or San Pedro Bay; is that right?

A That is correct.

* * *

Q Do you know of anybody who knows whether white croaker are producing fewer young at the Palos Verdes Shelf or San Pedro Bay than elsewhere?

A No.

Q And you don't know of anybody who knows whether white croaker have been having problems producing young at San Pedro Bay or at the Palos Verdes Shelf?

A No.

Ex. 10:527-28 (Hose tr. at 527:13-528:21).

In fact, Drs. Hose and Cross found that white croaker from the Southern California Bight reproduced just as successfully as the white croaker from a control group. Ex. 10:507 (Id. at 538:14-19). Dr. Hose also testified that she had found no effects of DDT upon white croaker reproduction. Ex. 10:503-04 (Id. at 473:12-474:8).

Dr. Cross likewise testified that he did not find any negative impact from DDT on the population of white croaker in the Southern California Bight. Ex. 11:509-11 (Cross tr. at 534:25-535:8, 537:1-10). He also testified that he did not know of any population effects upon the white croaker in any part of the Southern California Bight. Ex. 11:509 (Id. at 534:19-24). Indeed, William Conner, the head of NOAA's damage assessment effort for this case, wrote a memo to Dr. Hose stating that the government needed to "be prepared to explain why we think white croaker may have increased." Ex. 12:514.

In sum, there is no support in the record for the base and scope surveys' statements that white croaker were having problems producing young in the Palos Verdes Shelf area and that they produce fewer young there than elsewhere. The available evidence was to the contrary, and as noted by Dr. Conner, indicated that white croaker were increasing.

4. The Base and Scope Surveys' False And Unsupported Information About Reproductive Injury To Kelp Bass.

NRDA also told the survey respondents in both the base and scope surveys that kelp bass were having reproductive problems because they "are having problems producing young in one place off the South Coast," and that kelp bass "produce fewer young [there] than elsewhere." Exs. 3:290, 4:361 (emphasis in original). The survey respondents were not

informed of any other injury to kelp bass.

Dr. Robert Spies spearheaded Plaintiffs' study in 1993 and 1994 of whether DDT and PCBs have an impact on kelp bass by conducting a large-scale study of local kelp bass. Dr. Spies testified that kelp bass on the Palos Verdes Shelf enjoyed greater reproductive success than fish from a clean control site at Catalina Island:

Q In any event, sir, the mean percentage fertilization at Palos Verdes was about four times as high at Santa Catalina, according to your 1993 field data?

A That's approximately correct.

* * *

Q So again, the percentage hatchability was higher at Palos Verdes than in the fish at Santa Catalina; right? Higher in the fish at Palos Verdes than the fish at Santa Catalina, according to your own data?

A That's correct.

Q In sum, the data does not show lower reproductive success at Palos Verdes when compared to the control; isn't that right?

A With those fish, that's correct.

Q Well, these are the fish that you used from your study; isn't that right?

A That's correct.

* * *

Q In fact, the fish at Palos Verdes, according to your 1993 field study, showed a higher reproductive success rate than the fish at Santa Catalina in every category, didn't it?

A That's correct.

Ex. 13:516-19 (Spies tr. at 65:25-66:4, 67:19-68:14).

Thus, there is no support in the record for the base and scope surveys' statements that kelp bass were having problems producing young in the Palos Verdes Shelf area and that they produce fewer young there than elsewhere. The available evidence collected by Plaintiffs' biological experts was directly to the contrary.

ARGUMENT

I. THE CONTINGENT VALUATION SURVEY RESULTS ARE INADMISSIBLE UNDER F.R.E. 702 BECAUSE THEY DO NOT "FIT" THIS CASE.

A. Under Daubert And Its Progeny, Expert Testimony Must Clearly And Directly Fit The Actual Facts At Issue.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Supreme Court set forth the test for the admissibility of expert scientific evidence under Federal Rule of Evidence 702.[7] The Daubert test, which requires district courts to act as gatekeepers and exclude unfounded expert evidence, has two components. First, a district court must evaluate the basic methodology used and determine "whether the experts' testimony reflects scientific knowledge, whether their findings are derived by the scientific method, and whether their work product amounts to good science." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1315 (9th Cir.) ("Daubert on remand"), cert. denied, 516 U.S. 869 (1995) (quoting Daubert, 509 U.S. at 590, 593-95 113 S. Ct. at 2795, 2797) (internal quotation marks omitted). Second, the court "must ensure that the proposed expert testimony is 'relevant to the task at hand,' i.e., that it logically advances a material aspect of the proposing party's case." Id. (quoting Daubert, 509 U.S. at 593-95, 113 S. Ct. at 2797).

Because, as discussed above, Defendants do not now address the methodological flaws in contingent valuation generally or in Plaintiffs' CV surveys in particular, this motion focuses only on the second of the Daubert prongs, which is known as the fit requirement. In Daubert on remand, the Ninth Circuit explained that the "fit" requirement requires the proponent of an expert to demonstrate that the expert's testimony "clearly and directly" addresses a material issue in dispute in a litigation:

> "In elucidating the fit requirement, the Supreme Court noted that scientific

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[7] Federal Rule of Evidence 702, entitled "Testimony by Experts," provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

> expert testimony carries special dangers to the fact-finding process because it 'can be both powerful and quite misleading because of the difficulty in evaluating it.' Federal judges must therefore exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case. . . ."

43 F.3d at 1321 n.17 (emphasis added; internal quotation and citations omitted). Furthermore, an expert's opinion that his conclusion fits the facts of a case must itself qualify as "scientific knowledge." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 746 (3rd Cir. 1994) ("the expert's view that a particular conclusion 'fits' a particular case must itself constitute scientific knowledge"). To meet the threshold, the expert's conclusions must be based on hard evidence, or, in the words of the Daubert court, "more than subjective belief or unsupported speculation." 509 U.S. at 590, 113 S. Ct. at 2795.

B. Plaintiffs Bear The Burden Of Proving That They Meet The "Fit" Requirement.

Under the Ninth Circuit's holding in Daubert on remand, Plaintiffs clearly bear the burden of demonstrating that the CV surveys meet the requirement of Daubert and its progeny that expert evidence fits the true facts. As Judge Wilson of this District has stated: "Plaintiff, as the proponent of the expert testimony, bears the burden of showing that both [Daubert] prongs are satisfied." Sanderson v. International Flavors and Fragrances, Inc., 950 F. Supp. 981, 993 (C.D. Cal. 1996) (citing Daubert on remand, 43 F.3d, 1311, 1315, 1316, 1318 n.10).

C. The Courts Routinely Have Excluded Expert Evidence In Analogous Circumstances.

Following Daubert, federal courts at all levels repeatedly have excluded on fit grounds evidence that, like the Plaintiffs' CV surveys, either is based on assumptions that do not conform to the actual facts at issue or lacks the requisite clear and direct relationship to an issue in dispute.

In General Electric Company v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L. Ed. 2d 508 (1997), for example, the Supreme Court upheld a district court's exclusion of expert testimony proffered to support a plaintiff's allegation that he had developed cancer because of exposure to PCB-containing electrical transformers. 118 S. Ct. at 515-16. The plaintiff relied on several experts who opined, extrapolating from the effect of PCB exposure in mice, that the plaintiff's cancer was caused at least in part by his exposure to PCBs. Id. The Supreme Court held that the district court properly rejected these experts' testimony, because the studies on which they relied were dissimilar to the facts presented in the litigation. The Court said "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Id. at 519.

Likewise, in Daubert on remand, the Ninth Circuit rejected the testimony of a series of experts proffered by the plaintiff in a pharmaceutical products liability action. Although they were willing to testify that the drug in question was "capable of causing" the plaintiff's injuries, the experts could not testify that the drug actually did cause them. 43 F.3d at 1321-22. Similarly, as we discuss below, one of Plaintiffs' economic experts in this case has conceded that, in light of the errors in the CV surveys' injury descriptions, he and the other economic experts cannot testify to the actual amount of any lost use damages.

Other notable cases include the following:

- In re TMI Litig. Cases Consolidated II, 911 F. Supp. 775 (M.D. Pa. 1996). The plaintiffs, who claimed to have been injured following an accidental release of radioactive gases, designated an expert who produced plume dispersion models to demonstrate how the gases may have traveled in air and water. The court applied Daubert and held that the models did not fit the case because they were not based on the true facts, such as the actual topography of the area. Id. at 798. Just as the CV surveys here did not accurately describe any actual natural resource injuries, neither dispersion model accurately reflected the actual circumstances at issue. The TMI court accordingly held that "the models cannot 'clearly' speak to anything,"

and on that basis excluded the expert's testimony. Id.

- Guillory v. Domtar Indus. Inc., 95 F.3d 1320 (5th Cir. 1996). A defendant offered an expert to testify, using a model, about what may have happened in a forklift accident. The Fifth Circuit affirmed the district court's exclusion of this evidence on the grounds that the expert's model differed in several material respects from the actual forklift. Id. at 1331. As the court stated, in a quotation directly applicable here, "Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all." Id.

D. Because Plaintiffs Cannot Meet Their Burden Of Establishing "Fit," The CV Surveys Must Be Excluded.

Because the CV surveys' injury descriptions were false and unsupported, any expert testimony related to them cannot fit the facts of this case and is inadmissible. Indeed, Plaintiffs' own experts acknowledge that unless a CV survey accurately describes the injuries at issue, it will not yield meaningful results. Raymond Kopp, a lead author of the CV Report, was examined on this subject at his deposition, and testified as follows:

Q Would you express, would you get on the stand and express an opinion in this case as to what the lost uses were base[d] on this survey if, in fact, the fish were not producing fewer young?

A All I can say is the numbers that were generated by this survey on the basis of the injuries that are contained in this injury description [sic].

Q Now I want you to assume, hypothetically, Dr. Kopp, that in fact the fish in question are not producing fewer young. Would that change your opinion as to the scope of the extent[ ] of the interim lost use values in this case?

A By scope you mean the magnitude of the dollar[ ] amounts?

Q The amounts, correct.

A Without doing the study, I cannot tell you that. I can only tell you that if you change the scope of these injuries by reducing them, you will expect, all things being equal, the interim lost use calculations to decline. If you expand the injuries, it should increase.

Q But they would decline in a way that you're not able to testify to, isn't that right?

A Without doing another study, no.

Ex. 6:477-78 (Kopp tr. at 212:16-213:20 (objection and attorney colloquy omitted)).

Dr. Kopp's admission that "another study" would be necessary demonstrates that

the current surveys are without evidentiary value.

Accordingly, under the clear holdings of Daubert and its progeny, because the CV surveys were based upon a series of false and unfounded assumptions about critical facts, Plaintiffs cannot meet the requirement that the surveys fit the true facts, and all the survey results must be excluded.

II. THE C.V. SURVEYS ALSO ARE INADMISSIBLE UNDER F.R.E. 703.

Federal Rule of Evidence 703 prohibits expert testimony based on facts that are not "of a type reasonably relied upon by experts." It is unreasonable for an expert to base his or her opinion on facts that are unsubstantiated or on assumptions that are contrary to the record. Guillory, 95 F.3d at 1331 (excluding expert testimony because it was based on assumption different from the facts in the record); Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 142 (4th Cir. 1994) (expert opinion evidence "based on assumptions not supported by the record should be excluded."); In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1235 (5th Cir. 1986) (assumptions of expert differing from the known facts are not a reasonable basis for testimony); 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 703.05[4] (2d ed. 1999) (it is unreasonable for experts to rely on unsubstantiated facts or facts contrary to the record).

Because, for all the reasons identified above, the CV surveys were based on assumptions contrary to the record, they cannot be reasonably relied on, and are inadmissible under Rule 703.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court exclude from evidence the CV Report and any testimony related to it.

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